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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

WASHINGTON ASSOCIATION FOR
SUBSTANCE ABUSE AND VIOLENCE
PREVENTION, a Washington non-profit
corporation; DAVID GRUMBOIS, an
individual; GRUSS, INC., a Washington
corporation,

Plaintiffs,

v.

The STATE OF WASHINGTON,

Defendants.

No.

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

I. INTRODUCTION/RELIEF REQUESTED

In exercising the initiative power, voters must conform to the same constitutional restraints applicable to the Legislature when making laws. Principal among these constraints is Article II, § 19 which requires (1) all laws embrace only one subject and (2) that the subject of a law be expressed in the law's title. The rationale for these constraints is straight-forward. First, the voters should be able to understand easily the subject of the initiative on which they are voting. Second, an initiative should not be an exercise in log-

1 rolling where the initiative drafter cobbles together unrelated subjects in order to attract
2 votes or takes advantage of the popularity of one subject to obtain passage of another
3 subject that lacks majority support. Initiative No. 1183 ("I-1183") violates these two
4 constitutional constraints.

5 The principal subject of I-1183 is the privatization of the sale and distribution of
6 hard liquor in the State.¹ But I-1183 goes for beyond simply privatizing hard liquor
7 distribution and sales. I-1183 also (1) fundamentally alters the distribution and pricing
8 laws for wine to allow for, *inter alia*, discriminatory, non-uniform pricing, (2) seeks to
9 raise new general state revenue by imposing taxes (in guise of fees) on the distribution and
10 sale of hard liquor and directing part of that revenue to local public safety programs with
11 no connection to alcoholic beverages, and (3) absolutely bans the State from regulating
12 advertisement of the price of beer, wine, and hard liquor. The inclusion of these
13 additional subjects, and the failure of the title of I-1183 to identify them, renders I-1183
14 unconstitutional.

15 The dramatic changes resulting from the invalid enactment of I-1183, especially
16 the privatization of the hard liquor business and the fundamental alteration of the
17 regulations regarding wine distribution, will significantly harm a variety of Washington
18 citizens and businesses. Plaintiff Gruss, Inc., owns two Red Apple Markets. Those small
19 stores will not be able to compete with large box stores such as Costco and Walmart
20 because of the latter's ability to undercut the former's wine pricing, thus threatening the
21 existence of the smaller business. Plaintiff Dave Grumbois, a landlord in Cowlitz County,
22 will lose the State's lease with him as a result of I-1183. In these economic times he is not
23

24 ¹ Washington law defines "liquor" to include spirits, wine and beer. RCW 66.04.010(25). I-1183 uses the
25 term "hard liquor" and "spirits" interchangeably. To avoid confusion, Plaintiffs use the term "beverage
alcohol" in this Motion to include hard liquor (spirits), wine and beer. Plaintiffs use the term "hard liquor"
when referring to spirits.

1 likely to find a replacement tenant. These harms are actual, substantial and irreparable.
2 Plaintiff Gruff's harms are also immediate. Uniform pricing for wine will end on
3 December 8, 2011, and volume and other price discounts will be permitted after that date.
4 Plaintiffs, therefore, seek a preliminary injunction to preserve the status quo and stop I-
5 1183 from being implemented pending the conclusion of this litigation.

6 **II. STATEMENT OF ISSUE**

7 Whether the Court should preliminarily enjoin the implementation of I-1183 where
8 the initiative contains multiple subjects, not all of which are in the ballot title, and
9 implementation of the initiative would cause actual and substantial injury to the Plaintiffs?

10 **III. EVIDENCE RELIED UPON**

11 Plaintiffs rely on the Declarations of Jeff Uberuaga ("Uberuaga Decl."), David
12 Grumbois ("Grumbois Decl."), and Michael Subit ("Subit Decl.") and all attachments
13 thereto, as well as the pleadings and papers filed in this action.

14 **IV. FACTS**

15 **A. Washington's History of Regulatory Control over Wine and Hard** 16 **Liquor.**

17 In 1933, the Twenty-First Amendment to the United States Constitution repealed
18 Prohibition and granted states the power to regulate the distribution and sale of alcohol.
19 U.S. CONST. amend. XXI. In 1934, Washington adopted the Washington State Liquor
20 Act (the "Liquor Act"), which created a comprehensive control system for the distribution
21 and sale of beverage alcohol. *See* Chapter 66.08 RCW. The Liquor Act established the
22 Washington State Liquor Control Board (the "LCB"). RCW 66.08.012. The LCB is a
23 State administrative agency empowered to regulate the distribution and sale of beverage
24 alcohol, which is divided into four subcategories: alcohol, spirits ("hard liquor"), wine,
25 and beer. RCW 66.04.010 (25).

1 There is a long history in Washington of wine being regulated distinctly from hard
2 liquor. The LCB's earliest regulations treated wine and hard liquor differently. Taverns
3 could sell wine by the glass. Subit Decl., Ex. A. (HistoryLink.org Essay 9692, *Governor*
4 *Clarence Martin signs the Steele Act establishing the Washington State Liquor Control*
5 *Board on January 23, 1934*). But people could not consume hard liquor in public. *Id.*
6 The LCB licensed grocery stores to sell packaged wine. *Id.* Grocery stores, however,
7 could not sell hard liquor; the LCB permitted only state liquor stores to make such sales.
8 *Id.* The LCB's regulation over the distribution and sale of wine has been relaxed over the
9 years; the LCB's control over the distribution and sale of hard liquor has remained strict.
10 *Compare, e.g.,* RCW 66.28.280 (permitting private distribution and sale of wine) *with*
11 RCW 66.16.010 (state control of hard liquor sales and distribution).

12 **B. Washington's Regulatory Scheme for Wine before I-1183.**

13 Washington employs a "three-tier" system for the distribution and sale of wine and
14 beer. RCW 66.28.280; Nathan S. Ford, Jr., *Three-Tier Review Task Force, Beer and Wine*
15 *Three-Tier System Review Task Force Report* (2006) ("Task Force Report") (attached as
16 Ex. B to Subit Decl.). This system consists of the following tiers: manufacturer,
17 distributor, and retailer. Task Force Report at 10. The LCB inserted the distributor tier
18 after Prohibition to provide a buffer between the manufacturers and retailers in order to
19 eliminate or reduce undue influence, and to provide a mechanism for efficient tax
20 collection. *Id.* at 11.

21 The LCB controls the three-tier system for wine through a regulatory licensing
22 scheme. *Id.* Participants in each tier must obtain a license to manufacture, distribute, or
23 sell wine, with a variety of regulations applying to each type of license. *See, e.g.,* RCW
24 66.24.170 (domestic winery license); RCW 66.24.200 (wine distributor license); RCW
25

1 66.24.360 (grocery store retail license for wine). The Legislature has recognized that this
2 three-tier system is a valuable system for the distribution of wine. RCW 66.28.280.

3 A fundamental aspect of the State's three-tier system is the creation and
4 enforcement of a uniform pricing structure, which means that the producer of a particular
5 wine sells that product to all distributors at the same price, and a distributor sells a
6 particular product to all retailers at the same price. RCW 66.28.170 (manufacturer); RCW
7 66.28.180(d) (distributor). The sales to retailers must be on a delivered price basis, so that
8 a retailer in a small farming community or any other remote corner of the State will pay
9 the same price for a particular wine as every other retailer served by the same distributor.
10 See RCW 66.28.180. Volume discounts are illegal on sales to distributors or sales to
11 retailers. *Id.* Further, retailers may not centrally warehouse wine, nor sell to other
12 retailers. See RCW 66.24.185 (preventing warehousing by any person other than a
13 domestic winery, bonded wine warehouse, wine distributor, wine importer, certificate of
14 approval holder, or the LCB). All of these provisions work together to ensure that the
15 price for wine is at least roughly the same everywhere in the State. This eliminates any
16 possibility of price discrimination, which would put small businesses at an economic
17 disadvantage against larger businesses and encourage over-promotion of sales. See RCW
18 66.28.170 (prohibiting price discrimination). It also eliminates significant geographic
19 disparities, so everyone in the State has reasonable access to wine at reasonable prices.

20 **C. Washington's Regulatory Scheme for Hard Liquor before I-1183.**

21 Unlike the three-tier regulatory system applicable to wine and beer, the State
22 separately and directly controls the distribution and sale of hard liquor. See, e.g., RCW
23 66.16.010. The State has done so since enacting the Liquor Act in 1934. Washington is
24 one of 18 liquor control states that retain exclusive control over the distribution and sale of
25 hard liquor. Washington State Liquor Control Board, *Fiscal Year 2010 Annual Report*,

1 <http://liq.wa.gov/publications/2010-annual-report-final-web.pdf> (attached as Ex. C to
2 Subit Decl.).

3 The State acts as both the distributor and the retailer for hard liquor. To do so, the
4 State operates a central facility in Seattle to distribute hard liquor to its state-operated and
5 contract liquor stores for retail sale. *Id.* at 9-10. As of 2010, the LCB had established 323
6 state liquor stores in Washington.² *Id.* These state liquor stores are responsible for
7 supplying hard liquor to the various types of licensees who sell hard liquor by the glass,
8 such as restaurants, taverns, and bars. Subit Decl., Ex. D. (Final Bill Report Engrossed
9 Substitute S.B. 5942, 62nd Leg., 1st Special Sess. (Wash. 2011)). In addition, and unlike
10 wine, hard liquor in original containers must be purchased exclusively from state liquor
11 stores.³ *See, e.g.,* RCW 66.16.010.

12 **D. I-1183.**

13 I-1183 passed in the November 2011 general election. I-1183 has several distinct
14 purposes. First, I-1183's primary purpose is to get the State out of the hard liquor
15 business by privatizing Washington's system of hard liquor distribution and sales. Subit
16 Decl., Ex. E (I-1183 § 101(1)(a)). The measure requires the closure and sale of the State's
17 liquor distribution center and allows private entities to distribute hard liquor. *Id.* (I-1183 §
18 101(c)). I-1183 also requires the closure of current state-operated liquor stores and the
19 sale at auction of the right to operate a privately licensed liquor store at the same
20 locations. *Id.* (I-1183 § 102(2)). In addition, private retailers with store premises of
21 10,000 square feet or larger will be allowed to sell hard liquor. *Id.* (I-1183 § 101 (g)).
22 The measure also permits smaller stores to sell hard liquor under certain circumstances.

24 ² State liquor stores are operated by the State, or in areas less populated or seasonally popular, operated by
25 private parties under contract with the State. *See* RCW 66.08.050(2). There are approximately 164 state-
operated liquor stores and 159 contract liquor stores in Washington. Subit Decl., Ex C. (2010 fiscal report).

³ There is a minor exception to this rule for craft distilleries.

1 *Id.* The transition from the state-controlled system to the private licensee system for
2 retailing and distributing hard liquor must be completed by June 1, 2012. *Id.* (I-1183 §
3 102(6)).

4 Second, I-1183 fundamentally changes the distribution system for wine (but not
5 beer) by eliminating the current uniform pricing system and allowing price discrimination
6 on wine sales. Subit Decl., Ex. E (I-1183 § 119). Further, I-1183 will allow central
7 warehousing of wine by retailers. *Id.* (I-1183 § 123) (permitting licensed retailer to accept
8 delivery of wine at its licensed premises or at one or more registered warehouse facilities).
9 These changes will allow large distributors such as Costco and Walmart to demand
10 volume discounts to give them a price advantage over smaller stores throughout the State.
11 *Id.* (I-1183 § 119).⁴

12 Third, I-1183 attempts to protect current, and raise new, state revenue from hard
13 liquor sales. Each retail licensee must pay to the LCB seventeen percent of all hard liquor
14 sales revenue in addition to other taxes collected on sales. Subit Decl., Ex. E (I-1883 §
15 103(4)). In addition, a retail licensee must also pay an annual license renewal fee of one
16 hundred sixty-six dollars. *Id.* (I-1183 § 103(5)). To obtain a distributor license, I-1183
17 levies a three-year license issuance fee. *Id.* (I-1183 § 105(3)). In the first two years of
18 licensure, each hard liquor distributor must pay to the LCB a ten percent fee on total
19 revenue from the licensee's sales of hard liquor. *Id.* (I-1183 § 105(3)(a)(i)). In the third
20 year of licensure, I-1183 reduces this fee to five percent on total revenue. *Id.* (I-1183
21

22 ⁴ I-1183 also changes the three-tier system for wine into a four-tier system by creating a new retailer-to-
23 retailer sales tier. Subit Decl., Ex. E (I-1183 § 104). Section 104(1) provides for a grocery store licensee to
24 sell wine in original containers at retail for off premises consumption. *Id.* Section 104(2) provides for a
25 retailer reseller endorsement. *Id.* Only a grocery store licensee may obtain this endorsement. *Id.* Under
Section 104(8), a grocery store with this endorsement may take delivery of wine at one or more warehouse
facilities. *Id.* Leveraging this endorsement, grocery store retail licensees may sell warehoused wine at retail
to other retailers. In effect, the grocery license retail reseller endorsement creates a second or parallel
wholesale tier. See *id.* (I-1183 121 § (3)).

1 105(3)(a)(ii)). In addition to the distributor licensure fee, each distributor must pay an
2 annual license renewal fee of one thousand three hundred twenty dollars for each licensed
3 location. *Id.* (I-1183 105(4)). As described below, although I-1183 terms these revenues
4 as “fees,” they are truly taxes intended to raise general revenue. I-1183 specifically
5 directs the new revenue collected from these “fees” be provided to enhance local public
6 safety programs. There is, however, no requirement that such programs have anything to
7 do with the societal impacts of the increased hard liquor sales that will result from I-1183.

8 Fourth, I-1183 eliminates State restrictions on retailer advertising of beverage
9 alcohol including an absolute ban on any restrictions of advertising pricing. Under
10 existing law, the LCB and its state-operated and contract liquor stores are prohibited from
11 advertising beverage alcohol “in any form or through any medium whatsoever.” RCW
12 66.08.060 (adopted in 1933). I-1183 permits the retail advertising of beverage alcohol
13 subject to the LCB’s “rules as to the kind, character, and location of advertising.” Subit
14 Decl., Ex. E (I-1183 § 108). I-1183 specifically prohibits any State restrictions on the
15 advertising of prices of any type of beverage alcohol be it beer, wine, or hard liquor. *Id.*
16 (I-1183 § 107).

17 Certain of the Initiative’s provisions, including the abolition of the requirement for
18 uniform, non-discriminatory pricing of wine, become effective on December 8, 2011. By
19 January 1, 2012, LCB must issue spirits distributor licenses to all eligible applicants. On
20 March 1, 2012, spirits distributor licensees may start selling hard liquor to retailers. On
21 June 1, 2012, spirits retailers may start selling hard liquor to consumers and on-premise
22 retailers. No later than June 1, 2012, the State must close all state liquor stores.

23 **E. I-1183 Was Drafted to Serve Costco’s Special Interests.**

24 Costco Wholesale Corporation (“Costco”) has attempted to redefine Washington’s
25 wine and hard liquor regulatory schemes on several previous occasions. *See, e.g., Costco*

1 *Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1234, 1237 (W.D. Wash. 2005). In 2004,
2 Costco filed suit against the LCB, challenging the wholesale pricing scheme for wine. *Id.*
3 In 2006, Costco lobbied the Legislature against efforts to rewrite wine distribution law.
4 Subit Decl., Ex. F. In 2009, Costco lobbied the Legislature to adopt changes to beverage
5 alcohol laws. *Id.* In 2010, Costco sponsored Initiative No. I-1100 that had similar
6 objectives to that of I-1183 but was defeated in the 2010 election. Subit Decl., Ex. G. In
7 2011, Costco drafted a bill to privatize hard liquor in a manner similar to I-1183, but it
8 never received a hearing by the Legislature. Subit Decl., Ex. F.

9 Costco financially backed I-1183. According to the Public Disclosure
10 Commission ("PDC"), Costco donated a record setting \$22.52 million to the "Yes on
11 1183 Coalition" political action committee (the "PAC"). Subit Decl., Ex. H. The PAC's
12 second and third highest donors contributed \$50,000 each and its fourth and fifth highest
13 donors contributed \$250 and \$100, respectively. *Id.*

14 V. ARGUMENT

15 A. Standard for Preliminary Injunctive Relief.

16 Civil Rule 65 governs trial court procedure for obtaining an injunction. The
17 purpose of a preliminary injunction is to preserve the status quo while the plaintiffs
18 compile the evidence necessary to demonstrate their entitlement to a permanent
19 injunction. *Northwest Gas Ass'n v. Washington Utilities & Transp. Com'n*, 141 Wn.
20 App. 98, 113, 168 P.3d 443 (2007). To obtain injunctive relief of any kind, the movant
21 must show (1) a clear legal or equitable right; (2) a well-grounded fear of immediate
22 invasion of that right; and (3) that the act complained of will result in actual and
23 substantial injury. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998);
24 *Northwest Gas Ass'n*, 141 Wn. App. at 115 (citing *Tyler Pipe Indus. Inc. v. Dep't of*
25 *Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). Injunctions are addressed to the

1 equitable powers of the court and the listed criteria must be examined in light of
2 competing equities, including balancing the relative interests of the parties and, if
3 appropriate (as here), the interest of the public. *Tyler Pipe Indus.*, 96 Wn.2d at 792;
4 *Northwest Gas Ass'n*, 141 Wn. App. at 122.

5 At a preliminary injunction hearing, the plaintiff need not prove, and the trial
6 court does not reach or resolve, the merits of the three criteria for injunctive relief set
7 forth above. *Northwest Gas Ass'n*, 141 Wn. App. at 116; *Tyler Pipe*, 96 Wn.2d at 793.
8 Rather, the trial court considers only the *likelihood* that the plaintiff will ultimately
9 make the required showings. *Id.* A court should, however, reach the merits of purely
10 legal issues before deciding whether to grant or deny the preliminary injunction. *Rabon*
11 *v. City of Seattle*, 135 Wn.2d 278, 286, 957 P.2d 621 (1998). To facilitate appellate
12 review, a trial court should also enter findings of fact and conclusions of law supporting
13 its grant or denial of preliminary relief. *San Juan County v. No New Gas Tax*, 160
14 Wn.2d 141, 154, 157 P.3d 831 (2007).

15 **B. Standards for Evaluating Initiatives.**

16 Courts “do not review initiative measures under more or less scrutiny than
17 legislatively enacted bills.” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d
18 622, 631, 71 P.3d 644 (2003). Where interpretation of the meaning of the initiative is
19 required, [courts] focus on the language “as the average informed voter voting on the
20 initiative would read it.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183,
21 205, 11 P.3d 762 (2000) (“*ATU 587*”); *Washington Citizens Action of Washington v.*
22 *State*, 162 Wn.2d 148-49, 155, 171 P.3d 486 (2007). Although Plaintiffs admittedly have
23 to demonstrate the unconstitutionality of I-1183 “beyond a reasonable doubt”, *id.*, as
24 demonstrated below, Plaintiffs can meet that burden.

1 **C. I-1183 Violates Article II, § 19 of the Washington Constitution.**

2 Article II, § 19 of the Washington Constitution provides that: “No bill shall
3 embrace more than one subject, and that shall be expressed in the title.” It thus contains
4 two prohibitions: “(1) no bill shall embrace more than one subject (single subject rule),
5 and (2) that subject shall be expressed in the title of the bill (subject in title rule).” *State*
6 *ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash.2d 13, 23, 200 P.2d 467 (1948). I-1183
7 violates both these requirements of Article II, § 19.

8 1. I-1183 Violates the Single Subject Rule.

9 The first clause in Article II, § 19 requires that every bill (including initiatives)
10 contain only a single subject. *ATU 587*, 142 Wn.2d at 207. More than 100 years ago, the
11 Supreme Court declared that Article II, § 19 was “the most salutary provision in our state
12 constitution.” *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 516, 104 P. 791 (1909).
13 “[W]hen laws are enacted in violation of this constitutional mandate, the courts will not
14 hesitate to declare them void.” *Patrice v. Murphy*, 136 Wn.2d 845, 852, 966 P.2d 1271
15 (1998). The purposes of Article II, § 19 are to (1) prevent “logrolling” or “hodge-podge”
16 legislation and (2) assure that members of the legislature and the public are generally
17 aware of what is contained in proposed new laws. *Washington State Legislature v. State*,
18 139 Wn.2d 129, 146, 985 P.2d 353 (1999); *Washington Fed’n of State Employees v. State*,
19 127 Wn.2d 544, 552, 901 P.2d 1028 (1995). Basic democratic principles underlie the
20 requirement that all legislative proposals contain only one subject. *Washington Fed’n*,
21 127 Wn.2d at 552.

22 The single subject requirement prevents the combining of two issues supported by
23 less than a majority to obtain the passage of both, *id.*, and the attachment of an unpopular
24 measure to a popular one to obtain the passage of the former along with the latter. *See*
25 *Washington State Legislature*, 139 Wn.2d at 145. Article II, § 19 ensures that every

1 legislative proposal passes or fails on its own merits. See *Washington State Legislature*,
2 139 Wn.2d at 145; *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d
3 676 (1956).

4 Logrolling is an even greater danger to the democratic exercise of power in
5 the initiative process. What is to prevent an individual or group from
6 including mildly objectionable legislation—that is, legislation which might
7 benefit a small group and is mildly disfavored by the electorate as a
8 whole—in an initiative measure which includes other legislation which has
9 great popular appeal? . . . The legislature can delete parts of a proposal it
disfavors; the electorate is faced with a Hobson's choice: reject what it
likes or adopt what it dislikes. Only article 2, section 19 preserves the
integrity of the initiative process.

10 *Fritz v. Gorton*, 83 Wn.2d 275, 333 517 P.2d 911 (1974) (Rosellini, J. dissenting)
11 (reasoning adopted by the Court in *Washington Fed'n*). If an act embraces more than one
12 subject, and multiple subjects are expressed in the title, the entire act fails. *Power Inc. v.*
13 *Huntley*, 39 Wn.2d 191, 198-203, 235 P.2d 173 (1951); *Washington Toll Bridge Auth v.*
14 *State.*, 49 Wn.2d at 526. Even if there is a severability clause, the act is still void in its
15 entirety. *Power Inc.*, 39 Wn.2d at 203. In such a case, there is no way for a court to
16 determine which of the two or more subjects in the act is the “true legislative purpose”
17 and uphold one rather than another. *Id.* at 198-203.

18 Where the challenged legislation is an initiative, courts review the initiative's
19 ballot title, not the legislative title. *Citizens*, 149 Wn.2d at 633 (ballot title is the relevant
20 title because it is the ballot title the voters are faced with when voting).

21 I-1183's ballot title provides as follows:

22 Initiative Measure No. 1183 concerns liquor: beer, wine,
and spirits (hard liquor)

23 This measure would close state liquor stores and sell their
24 assets; license private parties to sell and distribute spirits;
set license fees based on sales; regulate licensees; and
25 change regulation of wine distribution.

Should this measure be enacted into law? Yes [] No [].

1 Subit Decl., Ex. I (copy of ballot title).

2 Single subject challenges to initiatives require courts to first determine whether the
3 ballot title is general or restrictive. *ATU 587*, 142 Wn.2d at 207; *see also State v.*
4 *Stannard*, 134 Wash. App. 828, 835, 142 P.3d 641 (2006). “A general title is broad,
5 comprehensive, and generic as opposed to a restrictive title that is specific and narrow.”
6 *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001). Where a general title is
7 used, the single subject rule is violated if the general subject and incidental subjects lack
8 rational unity. *ATU 587*, 142 Wn.2d at 209. Where a restrictive title is used, an initiative
9 violates the single subject rule when its provisions are not fairly within its ballot title. *Id.*
10 at 210.

11 In *ATU 587*, the Supreme Court analyzed a single subject challenge to Initiative
12 695 (“I-695”). 142 Wn.2d at 215-17. I-695’s ballot title read: “Shall voter approval be
13 required for any tax increase, license tab fees be \$30 per year for motor vehicles, and
14 existing vehicle taxes be repealed?” *Id.* at 212. The Court held that “while the title of I-
15 695 seems in part restrictive, i.e., the part which says that [s]hall...license tab fees be \$30
16 per year for motor vehicles[,] the balance of the title broadens its scope, similarly to the
17 title in *Wash. Toll Bridge Auth. v. State* [, 49 Wn.2d 520, 304 P.2d 676 (1956)].” *Id.* at
18 216-17.⁵ Accordingly, the Court held that I-695’s title was general. *Id.* But in both *ATU*
19 *587* and *Wash. Toll Bridge Auth v. State*, the Court ultimately held that the laws violated
20 the single subject rule because each law contained two purposes that were not germane to
21 one another and, therefore, did not have rational unity. *Id.*

22 In *ATU 587*, the Court held the repeal of existing motor vehicle taxes and the voter
23 approval requirement for taxes were two separate subjects. *Id.* Neither subject was
24

25 ⁵ In *Wash. Toll Bridge Auth.*, the Court held that a bill title that provided procedures for establishing and
financing toll roads generally and also provided specifically for a toll road from Tacoma to Everett
constituted a general title. *Id.*

1 necessary to implement the other. *Id.* In *Wash. Toll Bridge Auth. v. State*, the Court held
2 that the provision for a specific toll road was subject to accomplishment, while generally
3 establishing and financing toll roads was continuing in nature. *Id.* The dual purposes
4 violated the single subject rule. *Id.*

5 In *State ex rel. Washington Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 27, 200 P.2d
6 467 (1948), the Court struck down a statute covering toll bridges and ferries as violative
7 of the single subject rule. 32 Wn.2d at 27. The Court reasoned that the act did not deal
8 with any broad subject such as >transportation system,= but simply with the narrow,
9 limited subjects of toll bridges and ferries.@ *Id.* In that context, toll bridges and ferries
10 were separate subjects, even though in the context of a broad bill that actually concerned
11 the overall transportation system, they might be regarded as subdivisions of a single
12 subject.

13 On the other hand, Washington courts have upheld against article II, section 19
14 challenges measures that were comprehensive enactments broadly covering a single
15 multifaceted subject or that addressed only the common aspects of two distinct subjects.
16 The cases sustaining comprehensive enactments with general titles are many. In the first
17 case interpreting article II, section 19, this Court held that nothing in that constitutional
18 provision prevents the enactment of a comprehensive law, such as an entire code of civil
19 procedure, with many and various subdivisions. *Marston v. Humes*, 3 Wash. 267, 276, 28
20 P. 520 (1891); accord *City of Seattle v. Barto*, 31 Wash. 141, 143, 717 P. 735 (1903);
21 *McQueen v. Kittitas County*, 115 Wash. 673, 682, 198 P. 394 (1921) (article II, section 19
22 was not intended to prevent the enactment of a complete law on a given subject, even
23 though the provisions of the law may be numerous and varied@).

24 I-1183 is not a comprehensive alcoholic beverage control law. Instead, I-1183 is
25 piecemeal legislation similar to the measures held unconstitutional in *ATU 587* and both

1 *Wash. Toll Bridge Authority* cases. There are parts of I-1183's ballot title that are
2 restrictive, *e.g.*, the part requiring privatization of hard liquor distribution and sales. But
3 even construing I-1183's ballot title as general due to the balance of the language in the
4 title, I-1183 violates the single subject rule because it concerns at least four distinct
5 identifiable subjects: (1) privatization of hard liquor distribution and sales; (2) altering the
6 distribution system for wine and eliminating the existing uniform pricing so to allow price
7 discrimination in wine sales; (3) imposition of multiple taxes on hard liquor to protect
8 existing and to create new revenue for the state and mandating new revenue be directed to
9 public safety programs not necessarily related to impacts from increased hard liquor sales;
10 and (4) changes to the State's regulation of beverage alcohol advertising.⁶ Like the
11 multiple subjects in *ATU 587*, none of these subjects are necessary to implement the other.

12 For example, privatizing hard liquor distribution and sales is an entirely separate
13 subject from changing the distribution and pricing of wine. This is particularly so in light
14 of the State's historic differentiation between the hard liquor and wine regulatory
15 schemes. The ballot title emphasizes this lack of connection. It cites four purposes
16 related to the privatization of hard liquor sales (close state liquor stores and sell their
17 assets; license private parties to sell and distribute spirits; set license fees based on sales;
18 regulate licensees) and then identifies one unrelated purpose: change regulation of wine
19 distribution. I-1183's language is similar. Of the 15 identified benefits of the Initiative
20 (sec. 101 (2)(a)-(o)), only the last two have anything to do with wine. And those two
21 benefits have nothing to do with the prior identified thirteen.

22 Both those subjects are separate from the purpose of increasing general state
23 revenue. Section 302 of I-1183 guarantees that revenues raised and distributed to local
24

25 ⁶ Plaintiffs do not, by analyzing I-1183's ballot title as arguably a general title for purposes of this motion,
waive the ability to assert that the ballot title is restrictive in subsequent proceedings.

1 communities will not only be kept at the same level as previously but increased by ten
2 million dollars per year. The new revenue is dedicated to enhance public safety programs
3 such as police and fire. But there is no requirement of a connection between that
4 enhancement and the societal harms that will be increased liquor consumption under I-
5 1183. Thus, the new general revenue provisions of I-1183 have no connection to
6 measure's privatizing liquor distribution and sales.

7 I-1183 contains a fourth subject unrelated to the prior three: a substantial change to
8 how the LCB regulates alcoholic beverage advertising. The measure allows advertising
9 for hard liquor for the first time but also prohibits for the first time State restrictions on
10 advertising of the prices of wine and beer (as well as hard liquor). Deciding whether to
11 privatize hard liquor sales and deciding whether retail stores should be allowed to
12 advertise the price of wine and beer without any State regulation are two distinct subjects
13 with no logical relationship to each other.

14 I-1183's four subjects are not germane to one another and therefore lack rational
15 unity. *ATU 587*, 142 Wn.2d at 216-17. Indeed, the only rational unity is that I-1183 is
16 drafted to benefit the Costcos of the world (who benefit from hard liquor privatization, the
17 change in wine pricing regulations, and the relief from advertising restrictions) and to buy
18 votes through required flow of new revenue to support police and fire programs even if
19 unrelated to problems created by increased liquor sales. Thus, voters were forced to vote
20 on the entire initiative, and all of its subjects, in order to pass any one of the subjects.
21 Such logrolling of legislation is exactly the evil the single subject rule is designed to
22 prevent. *ATU 587*, 142 Wn.2d at 207. Accordingly, I-1183 violates the single subject
23 requirement of Article II, § 19.

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2. I-1183 Violates the Subject-in Title Rule.

The second clause in Article II, § 19 requires that an initiative's ballot title contain only subjects embraced by the ballot title. *Washington Fed'n*, 127 Wn.2d at 552. "The purpose of this prohibition is to notify members of the Legislature and the public of the subject matter of the measure." *ATU 587*, 142 Wn.2d at 207 (citations omitted). Here, I-1183 fails in several respect to notify members of the public the subjects upon which they were voting.

One of the issues addressed in *ATU 587* was whether I-695's ballot title adequately reflected the subject of the initiative. *Id.* at 192. I-695's ballot title contained the word "tax," and the initiative's text provided a definition for the term "tax". *Id.* at 227. In comparing I-695's definition of "tax" to that of the term's commonly understood, traditional meaning, the Court concluded that the I-695 definition was broader. *Id.* Because I-695's ballot title did not inform voters that the initiative actually redefined the common meaning of the term "tax," the Court held that I-695's ballot title did not adequately reflect the contents of the initiative. *Id.*

Here, I-1183's ballot title contains a similar deficiency. I-1183's ballot title states that the initiative will "set license fees based on sales." Subit Decl., Ex. I (ballot title). While I-1183 does impose annual license fees, it also imposes what are legally taxes (rather than fees) as a percentage of sales. But I-1183's ballot title only identifies those as fees, not taxes. *See, e.g.*, Subit Decl., Ex. E (I-1183 § 103(4), (5)). The distinction between a "tax" and a "fee" is of constitutional magnitude. *See Franks & Son, Inc. v. State*, 136 Wn.2d 737, 749, 966 P.2d 1232 (1998).

A tax is a levy made for the purpose of raising revenue for a general governmental purpose. *Id.* at 750. By contrast, a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *Id.* The Washington Supreme

1 Court has set out three factors for determining whether a charge is considered a tax or a
2 regulatory fee:

3 [W]hether the primary purpose . . . is to accomplish desired public
4 benefits which cost money, or whether the primary purpose is to regulate;

5 . . .
6 [W]hether the money collected must be allocated only to the
authorized regulatory purpose; [and]

7 . . .
8 [W]hether there is a direct relationship between the fee charged and
the service received . . . or between the fee charged and the burden
produced by the fee payer.

9 *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995) (internal citations and
10 quotation marks omitted). The Washington Supreme Court since has confirmed that
11 “[t]he analysis under the three factors is vital because there are different restrictions for
12 imposing taxes versus imposing fees and legislative bodies may impose charges in the
13 name of fees that are, in fact, taxes in disguise.” *Arborwood Idaho, L.L.C. v. City of*
14 *Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004).

15 Under the first factor, a charge constitutes a fee only where the goal is to
16 “‘regulate’ fee payers – by providing them with a targeted service or alleviating a burden
17 to which they contribute – that would suggest that the charge was an incidental ‘tool of
18 regulation’ rather than a tax in disguise.” *Covell*, 127 Wn.2d at 879. Under the second
19 factor, “for a charge to be considered a fee under *Covell*, the Washington Supreme Court
20 has “found it ‘essential’ that the money collected be segregated and ‘allocated only to the
21 authorized regulatory purpose.’” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798,
22 809-10, 23 P.3d 477, 484 (2001). Under the third factor, the determinative consideration
23 is whether the goal is to “regulate fee payers by providing them with a targeted service or
24 alleviating a burden to which they contribute.” *Arborwood Idaho*, 151 Wn.2d at 371.
25

1 Here, the primary purpose of the charges is to raise revenue for the state general
2 fund, for local cities and counties, and provide for general public benefit, not to regulate
3 or provide services to the payer. Subit Decl., Ex. E (I-1183, § 101(2)(k) (initiative will
4 “[m]aintain the current distribution of liquor revenues to local governments”); I-1183, §
5 302 (promising ten million of additional revenue to support enhancement of public safety
6 programs)). See also RCW 66.08.190 (ordering disbursement of excess funds into the
7 state general fund). New revenue will be directed to enhance local public safety programs
8 but without any restrictions that such programs relate in any way to the harm from
9 increased hard liquor sales anticipated by I-1183. Consequently, the goal of these “fees”
10 is not to provide a targeted service or alleviate a burden to which the payers contribute.
11 Rather the purpose is to raise new general revenue to provide general support for local
12 police and fire services. Thus, under the *Covell* factors, the charges imposed by I-1183
13 have none of the characteristics of a regulatory fee and are, as a matter of law, taxes. See
14 *Covell*, 127 Wn.2d at 879.

15 Similar to I-695 in *ATU 587*, I-1183 uses a term in the ballot title for which the
16 text of the initiative provides a broader scope than would be understood by the average
17 voter. See 142 Wn.2d at 220. Here, by masquerading the charged taxes as “fees,” I-1183
18 has subsumed the term tax under the definition of fees, which is not consistent with the
19 term’s common, traditional meaning. See *Covell*, 127 Wn.2d at 879 (discussing the
20 common meaning of the term “fee” versus that of “tax”). Indeed, I-1183 further
21 perpetuates this misrepresentation by expressly and erroneously disclaiming that it raises
22 taxes. Subit Decl., Ex. E (I-1183 §301 (self-serving disclaimer that the initiative does not
23 raise taxes)). Like I-695, nothing in I-1183’s “ballot title gives any notice that would
24 indicate to the voters that the contents of the initiative would include voter approval for
25 charges” other than annual licensing fees when the term “fee” is used “or suggest inquiry

1 into the act be made to learn” that the broader meaning of “fee” includes taxes disguised
2 as “fees.” *Covell*, 127 Wn.2d at 879.

3 Several of I-1183’s other subjects, such as allowing price discrimination for wine
4 by elimination of the uniform pricing system, permitting retailer-to-retailer wine sales, and
5 altering the LCB’s regulations regarding alcohol advertising are also not reflected
6 adequately in the title. For all these reasons, I-1183 violates Article II, § 19’s subject-in-
7 title rule.

8 **D. Equity Requires Injunctive Relief to Prevent Plaintiffs’ Harms.**

9 In deciding whether to enjoin enforcement of I-1183 the Court must examine the
10 competing equities, including balancing the relative interests of the parties and the interest
11 of the public. *Tyler Pipe Indus.*, 96 Wn.2d at 792; *Northwest Gas Ass’n*, 141 Wn. App. at
12 122. Enforcement of I-1183 will harm Plaintiffs’ interests including damage to Plaintiffs
13 Gruss, Inc.’s and David Grumbois’s business interests.

14 Gruss, Inc. owns two local grocery stores in Washington State: the Ralph’s Red
15 Apple Market in Bremerton and the Poulsbo Red Apple Market in Poulsbo (collectively
16 “Red Apple Markets”). *Uberuaga Decl.*, ¶ 3. The Red Apple Markets are small, local
17 grocery stores that offer a variety of consumables for sale to their customers, including
18 wine. *Id.*, ¶ 6. The Red Apple Markets serve approximately 1,300 – 1,500 customers
19 daily, many of whom have come to expect competitive low prices on wine. *Id.*, ¶ 7. The
20 grocery industry is one of narrow profit margins. *Id.*, ¶ 8. The sale of wine offers no
21 exception and, as such, the Red Apple Markets’ profit margin on the sale of wine is
22 narrow. *Id.* In order to offer its customers wine at competitive prices, the Red Apple
23 Markets rely on the requirement that wine sales be based on uniform pricing. *Id.*, ¶ 9.
24 Uniform pricing levels the playing field between small grocers like the Red Apple
25 Markets and large box retailers like Costco. *Id.*, ¶ 10.

1 I-1183 eliminates uniform pricing over wine and provides for volume discounting
2 and central warehousing of wine. These changes enable large box retailers such as Costco
3 to pressure manufacturers and distributors of wine to provide them with volume discounts
4 on wine purchases to give them a price advantage over smaller grocery stores like the Red
5 Apple Markets. *Id.*, ¶ 12. Costco will also be able to purchase large quantities of wine to
6 be stockpiled in central warehousing before being sold below the price floor under which
7 the Red Apple Markets cannot fall without taking a loss on each sale. *Id.* This alteration
8 of wine distribution and pricing will directly and significantly harm the Red Apple
9 Markets' revenue model, which relies on the retail sale of wine. *Id.*, ¶ 13. Under I-1183,
10 the Red Apple Markets will be unable to compete with the large box retailers like Costco.
11 *Id.*, ¶ 14. Elimination of uniform pricing will also likely lead to a significant decrease in
12 the Red Apple Markets' overall revenue streams. *Id.*, ¶ 15. As customers turn to large
13 box retailers for cheaper wine, they will purchase other groceries from those large box
14 retailers out of convenience, all of which would ordinarily be purchased at the Red Apple
15 Markets. *Id.* Accordingly, enforcement of I-1183 will result in significant harm to the
16 Red Apples Markets' business.

17 I-1183 eliminates this State's prior requirement of uniform pricing for wine
18 effective December 8, 2011, and permits volume discounts after that date. If the Court
19 subsequently issues a final judgment invalidating I-1183, Red Apple Markets will have no
20 remedy for the economic damages they will suffer in the meantime by the implementation
21 of unlawfully enacted legislation. This equity tips sharply in favor of the issuance of a
22 preliminary injunction.

23 Plaintiff David Grumbois is an owner of commercial real property in Longview,
24 Washington. Grumbois Decl., ¶ 2. The State of Washington contracts with Grumbois to
25 lease space in Grumbois' real property for use as a state liquor store. *Id.*, ¶ 3, Ex. A. I-

1 1183 requires the State close the liquor store it operates in Grumbois' building by no later
2 than June 1, 2012. The State's lease with Grumbois runs through September 30, 2017.
3 *Id.*, ¶ 5. I-1183 will force the State to terminate the lease. Grumbois will have to find a
4 new tenant, which may be difficult in the current real estate market and economic climate.
5 *Id.*, ¶ 7. While I-1183 requires the State to sell at auction the right to run a liquor store in
6 the same location, there is no guarantee that the property will be leased or even that
7 someone will bid on the right given the competitive disadvantage small retail locations
8 face from large box retailers. *Id.*, ¶ 10. Moreover, even if Grumbois is able to find a
9 suitable tenant, the new tenant is unlikely to desire the current layout of the retail space,
10 which was built out specifically to accommodate a state-operated liquor store. *Id.*, ¶ 14.
11 Grumbois will have to expend resources to renovate the retail space in a manner that will
12 attract a desirable tenant. *Id.*, ¶ 15. I-1183 directly harms Plaintiff Grumbois' business by
13 forcing a good and stable tenant out of his building and replacing it with quite possibly no
14 tenant at all.

15 The public has a strong interest in enforcing the requirements of the Washington
16 Constitution. The public will not be harmed by delayed implementation of an initiative
17 that was enacted in violation of article II, § 19. Therefore, the equities favor granting
18 preliminary injunctive relief.

19 VI. CONCLUSION

20 Plaintiffs have a clear legal and equitable right to be governed only by laws
21 adopted in accordance with our state Constitution. I-1183 dramatically alters the liquor
22 regulation landscape and, absent an injunction, it will be difficult if not impossible to undo
23 the harm caused by this invalidly enacted initiative to Plaintiffs. Further, in balancing the
24 relative interests, the Plaintiffs' and the People's interests in protecting their constitutional
25 rights in the initiative process far outweigh the State's interest in implementing an

1 unconstitutional initiative. Therefore, the Court should preliminarily enjoin the State's
2 enforcement of I-1183.
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4 RESPECTFULLY SUBMITTED this 7th day of December, 2011.
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8 By: 

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